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UNIVERSAL CITY STUDIOS, INC., Lincoln - cross

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v.
NINTENDO CO., LTD

82 Civ. 4259 RWS

May 21, 1985

9:40 a.m.

(Trial resumed)

HOWARD LINCOLN resumed.

CROSS-EXAMINATION

BY MR. FAIRHURST: (CONT'G)

Q. Mr. Lincoln, before we broke up yesterday afternoon I had put to you two questions about revenues derived by Nintendo, speaking of both the Japanese and the American company, from the licensing of Donkey Kong products and you remember we talked about how much money was derived from it and I came up with a figure of \$17.2 million which I believe you said was accurate but you had some question whether it might include Donkey Kong Jr. revenues; do you recall that in substance?

A. Yes.

Q. Now, you are aware, are you not, that during the course of this litigation Nintendo has given responses to interrogatories put to it by Universal?

A. Certainly.

Q. You participated in the approval and review of those, did you not?

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1 Q. All right. Do you recall whether Nintendo ever
2 put out a press release saying of Donkey Kong that it
3 quickly achieved popularity in the arcades and became a
4 lucrative licensing property in the United States of
5 companies like Coleco and Atari?

6 A. I am sure we did.

7 Q. Do you know that you made that statement as late
8 as October 10, 1984?

9 A. I would still make it today if it would sell any
10 product.

11 Q. I'm going to go back to a few -- we'll get off
12 the subject -- of the seven licensees that you were
13 referring to yesterday as having breached their contracts
14 in some way with Nintendo as a consequence of the Universal
15 lawsuit and you will remember that one of of them was a
16 company called Super Shirts. As I understand it, you have
17 not sued Super Shirts; correct?

18 A. That's correct.

19 Q. Do you know whether the company exists today?

20 A. I have no way of knowing. I believe that the
21 company is located in the Washington area. I assume that
22 it does.

23 Q. Are you aware that they are in bankruptcy?

24 A. No, I was not. I can say if they are in
25 bankruptcy, we didn't get a filing. We didn't get notice.

1 MR. FAIRHURST: Move too strike, your Honor.

2 Q. I am asking a simple question. You don't have
3 to argue with me, please.

4 A. I am sorry. I didn't mean to argue with you.
5 The answer is I don't know.

6 Q. Do you recall writing to Mr. Bates of Super
7 Shirts in February 1983 in response to his letter which was
8 put in as Defendant's Exhibit 24. 24 was your letter.
9 I'll put it in front of you.

10 A. This was a letter that they sent to me, Mr.
11 Fairhurst.

12 Q. Sorry. I got it backwards. That's the letter
13 they sent to you. I am going to put in front of you the
14 letter that you sent to him.

15 Look at 24. In 24 they complained, in paragraph
16 3, I direct your attention: Second, we are extremely
17 disturbed that we were not informed of the pending
18 litigation before our licensing agreement became effective
19 and we began marketing Donkey Kong products in July,
20 referring to July 1982.

21 You wrote back to them, did you not, in February
22 of 1983, and you said to them, for your information, we did
23 advise and have continued to advise all prospective
24 licensees of the lawsuit, because you had just advised them
25 in January of the -- answered more properly -- the letter

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1 that I had sent, and as you know, Universal did not seek a
2 preliminary injunction or otherwise notify any of our
3 licensees of its suit at the outset of the litigation.

4 And that was the state of your knowledge
5 February 3, 1983, was it not, that Universal had not
6 notified a single one of your licensees, Nintendo's
7 licensees, of any lawsuit?

8 A. No. That was not my state of mind. I was
9 referring, Mr. Fairhurst,, to the fact that we had not, in
10 this letter, when I wrote Mr. Bates at Super Shirts, I was
11 referring to the fact that at the time of the litigation,
12 when the lawsuit was filed we made a decision not to notify
13 our existing licensees.

14 We did also make a decision that all prospective
15 licensees would be notified.

16 The point that he was making to me was, hey, I
17 was -- I felt into that prospective licensee category and I
18 was simply saying, no, you didn't, because you had signed
19 your license before the lawsuit was filed. In February of
20 1983 my state of mind was entirely different. I knew that
21 you people had notified all of our licensees.

22 Q. I refer you again to the statement you made in
23 February 3, 1983 to Mr. Bates. This is your letter, Mr.
24 Lincoln, to Mr. Bates: As you know, Universal did not seek
25 a preliminary injunction or otherwise notify any of our

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Lincoln - cross

1 licensees of its suit at the outset of the litigation.

2 A. The letter says that and I will say again what I
3 just testified to. I was concerned with pointing out to
4 Mr. Bates that, hey, you didn't fall into a category where
5 you signed a license after the litigation commenced. We
6 hadn't told you anything.

7 Now, it's obvious that licensees were -- became
8 aware very quickly of this lawsuit almost immediately after
9 it was commenced.

10 It's also true that the letter, the specific
11 letter to the licensees, went out in January of 1983.
12 Between January of 1983 and going back to June 28 of 1982
13 licensees were being made aware of this lawsuit not only by
14 the press release, not only by the filing but also by
15 specific contacts that Universal was making to several of
16 our key licensees, namely Milton Bradley and Atari, but I
17 was dealing with a specific problem trying to get this man
18 to understand we weren't trying to do anything that was
19 improper.

20 Q. You are familiar with a licensee called
21 Charleston Hoisery?

22 A. Yes, sir.

23 Q. That was another that you claimed backed out of
24 a license after learning of Universal's litigation?

25 A. I didn't say or use the words backed out of the

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1 license.

2 Q. Cancelled?

3 A. I think I may --

4 Q. I am not trying to express a fine point with you?

5 A. Fine.

6 Q. What purpose did you cite them for? Did you not
7 cite them for the proposition that they had refused to go
8 forward if the license because of the Universal lawsuit;
9 isn't that the substance?

10 A. You bet.

11 Q. Thank you.

12 Do you know how much money Charleston Hoisery
13 paid Nintendo while the license existed?

14 A. They paid a \$2,500. They didn't earn-out
15 anything further.

16 Q. They were granted the license in April of 1982,
17 correct?

18 A. Let me --

19 Q. Can't you answer that yes yes or no? April 1982
20 is all I am asking for.

21 A. Yes, they were granted a license in April of
22 1982.

23 Q. Had that license continued through the end it
24 would have expired in December of 1983 by its terms,
25 correct?

1 A. That's correct.

2 Q. During the period of that time, as far as you
3 know, they paid \$ 2,500 and they never submitted a single
4 royalty statement to you?

5 A. They never earned out their royalty.

6 Q. Thank you.

7 A. For the precise reason that the man gave in the
8 letter to us.

9 Q. I see.

10 A. Couldn't sell the stuff.

11 Q. You testified yesterday on direct that you first
12 learned of the claim by Universal as a consequence of a
13 telephone call that you received from your Los Angeles
14 attorney, Mr. Clark?

15 A. Yes, sir.

16 Q. You put that on or about the 27th of April?

17 A. It was a few days before the telex, yes.

18 Q. Can you tell us when the first occasion was that
19 you actually had in your hand and saw and read the telex
20 that Universal sent to Nintendo in Japan?

21 A. It would have been several days after the 28th,
22 maybe the 30th. I guess there's only 30 days in April.

23 Q. Mr. Arakawa provided you with a copy?

24 A. Mr. Arakawa a called me at home and told me the
25 substance of the telex. I believe he may have -- I recall

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1 us comfort at all?

2 A. No.

3 Q. He didn't say that. All right.

4 The sum and substance of it was that, whether he
5 used those words or did not, when you left that caucus
6 Nintendo refused to give Coleco an indemnity, did it not?

7 A. There was no indemnification language in the
8 agreement.

9 Q. I am aware of that. I am asking you whether you
10 gave him one notwithstanding the contract provisions. I
11 certainly didn't volunteer one.

12 Q. He asked you for one didn't he?

13 A. He made a passing reference to it.

14 Q. You said he made a passing reference to it as
15 well in the telephone conversation you had that preceded
16 the May 6 meeting. What was the passing reference in the
17 telephone conversation?

18 A. He knew, he was aware there was no
19 indemnification clause in the agreement that they had
20 signed. It was as simple as that.

21 Q. Do you recall, Mr. Lincoln, that Mr. Schwefel
22 repeated his request for an indemnity of Nintendo
23 subsequent to the May 6 meeting in subsequent telephone
24 conversations with you?

25 A. At some point in those phone conversations that

1 I had with him he again made reference to the fact that
2 there was no indemnification and he may have asked me will
3 Nintendo give an indemnification.

4 . But my recollection of this is that he almost
5 answered his own question. I didn't have to answer the
6 question or really get into it. He simply said, well, of
7 course, there's no indemnification clause in the agreement.

8 Q. And there was no warranty or representation as
9 to the validity of the Donkey Kong trademark with respect
10 to third-party claimants, was there?

11 A. That's way I put it in the agreement that we
12 sent to him.

13 Q. But you had the opportunity when Mr. Schwefel
14 asked you to give him that to give him it but you didn't
15 give it to him, did you?

16 A. We didn't give it to him.

17 Q. And you never gave it to him, correct?

18 A. We never gave it to him.

19 Q. To this day Nintendo has not granted Coleco an
20 indemnity against claims from Universal on those two
21 licensing agreements, correct?

22 A. That's correct.

23 Q. Did you know as of June 16 that Coleco was going
24 to sign an agreement with Universal?

25 A. I was told on June 16 by Mr. Hadl that Coleco

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Q. Nintendo did not contribute to it?

A. No.

Q. Just to clear up a few more points on the Coleco licenses.

The royalty rate that Coleco was to pay Nintendo was agreed contemporaneous I assume with the execution of those agreements in February of 1982?

A. I think it was agreed in November of 1981?

Q. Even before in November of 1981?

A. Yes.

Q. At November of 1981 the royalty rates payable by Coleco to Nintendo on the sales of the tabletop game and the cartridge were agreed and fixed in the agreement, correct?

A. There was an oral agreement.

Q. And it was subsequently embodied in the written agreements, 12 and 12 A?

A. Certainly.

Q. That was never changed during the course of those contracts, correct?

A. You mean between the time that Nintendo agreed to grant the licenses?

Q. No. I mean during the course of the execution of it. Coleco went on to make the game we all know, correct?

1 A. Sure.

2 Q. Coleco has continued to pay those royalties as
3 long as it was making sales, correct?

4 A. Yes.

5 Q. That's all I am trying to establish. As far as
6 I know Nintendo has never taken the position that Coleco
7 has refused to pay royalties under that agreement that are
8 owed to Nintendo; is that correct?

9 A. We have had occasional disputes or problems in
10 collecting royalties.

11 Q. But not of anything having to do with the
12 Coleco/Universal covenant not to sue?

13 A. No.

14 Q. These are disputes that one might ordinarily
15 expect with licensees I suppose?

16 A. I suppose.

17 Q. That's the gist of what my question is.

18 A. Yes.

19 Q. Nintendo's royalties under those agreements are
20 based on the number of units sold by Coleco, correct?

21 A. Yes.

22 Q. So the marketing and the skills and the ability
23 to sell those games was entirely left to Coleco?

24 A. Yes.

25 Q. And I believe we already established you had

1 given a press release saying that Coleco and Atari had
2 lucrative licensing arrangements and this was in October of
3 1984, they were doing a good job?

4 A. Did you ask me a question?

5 Q. Yes. We went over it before. I am going back
6 to another point that in October of 1984 a press release
7 was issued by Nintendo referring to those agreements and
8 Donkey Kong saying it quickly achieved popularity in the
9 arcades and became a lucrative licensing property in the
10 United States of companies like Coleco and Atari?

11 A. Yes.

12 Q. Is the gist of your claim with respect to Coleco
13 that it breached those two agreements, 12 and 12 A because
14 it settled with with Universal rather than defend that
15 claim; is that the act that impaired?

16 A. The act that impaired it was the settlement and
17 the license.

18 Q. Was it your understanding, Mr. Lincoln, that
19 Coleco did not have the right to settle a legal claim
20 against it for trademark infringement under those
21 agreements?

22 A. I would have to look at the agreements.

23 Q. Let me direct your attention specifically to
24 paragraph 13 C.

25 THE COURT: Page 12.

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connection with the Donkey Kong audiovisual game, when in fact there is no connection at all.

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You saw that letter on the 15 or 16th or shortly thereafter?

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A. Yes.

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Q. So you were aware that the description given by Mr. Schwefel at that point was based on something having to do with a catalogue as opposed to a game?

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A. That's correct.

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Q. Did you subsequently learn that Mr. Schwefel had sent or Coleco had sent a lawyer from Kaye Scholer to Chicago to take a look at the game?

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A. Yes.

Q. Did Mr. Schwefel report back to you that based on the report of that lawyer that Coleco would take no action against the game?

A. Yes.

Q. Did he tell you that was because, A, the game was a pretty crumby game and Coleco didn't want Tiger to improve it in some way to make it better?

A. That's what he said.

Q. And if they forced further changes in the game that might result, correct?

A. That's what he said.

Q. Didn't he also tell you that as far as an

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1 infringement claim is concerned under the copyright laws
2 his view and his lawyers' view was that it was an if fee
3 question?

4 A. That's what he told me.

5 Q. You had no position to contradict him at that
6 point, had you?

7 A. I hadn't seen the game.

8 Q. Had Coleco submitted any kind of a draft of this
9 letter before it went out, to Nintendo?

10 A. I don't think so.

11 Q. You were unaware as of May 14 that Coleco was
12 claiming that King Kong was confusingly similar to Donkey
13 Kong?

14 A. I didn't see a draft of the letter. I just got
15 a copy.

16 Q. Did Mr. Schwefel tell you at sometime when you
17 were discussing this Tiger game that Universal had told him
18 that if Coleco had any problems with the Tiger game
19 Universal would make certain that it was changed?

20 A. I don't recall that. I don't recall that
21 because my recollection is that Hadl said the license had
22 been terminated. That's my recollection.

23 Q. But you had subsequent conversations with Mr.
24 Schwefel, did you not?

25 A. Yes, I did.

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1 Q. At some point you learned that it was not
2 terminated?

3 A. At some point I did.

4 Q. The question is not really accurate: At some
5 point you learned that the agreement had been reconstituted
6 or redone? It may have been terminated but then it was
7 redone again?

8 I am not suggesting to you that it was not
9 terminated at one point. I want to be clear on that.

10 Nintendo never sued Tiger, correct?

11 A. That's correct.

12 Q. As I understand it, it is the policy of Nintendo
13 and I believe you have taken adds out in the trade press --
14 to vigorously pursue knockoff imitations of Donkey Kong and
15 Donkey Kong Jr. and Nintendo protected properties; is that
16 correct?

17 A. It is very clearly the policy of Nintendo to go
18 after infringers.

19 Q. You brought something like about 22 lawsuits in
20 this country over knockoffs?

21 A. We brought a lot of lawsuits.

22 Q. Of those 22 lawsuits that you have brought 19 I
23 believe were over a game called Crazy Kong or Kong Gorilla?

24 A. I don't know if the number is 19.

25 Q. A major portion of them?

Lincoln - cross

1 A. I think you are probably looking at subparagraph
2 B.

3 Q. C, "each party shall have", the very last
4 paragraph.

5 A. Right. Okay.

6 Yes.

7 Q. It was your understanding that they could defend
8 it but couldn't settle it?

9 A. That's what the language says.

10 Q. Can you tell us, Mr. Lincoln, when the first
11 time was that you saw the Tiger tabletop game?

12 A. It would have been sometime in 1982, Mr.
13 Fairhurst. I can't give you a month.

14 Q. Would that be also true of the cassette?

15 A. Yes. It was clearly sometime in 1982. It was
16 clearly after May 14th.

17 Q. After the litigation commenced, correct, the
18 litigation I mean the lawsuit--

19 A I can't pin it down.

20 Q. You knew nothing about the Tiger game when you
21 went down to Universal on May 6th?

22 A. No.

23 Q. When you learned that Tiger electronic had been
24 granted a license by Universal to make a tabletop King Kong
25 game and a King Kong video cassette for home use from Mr.

duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KIRBY:

Q. Mr. Pederson, by whom are you presently employed?

A. Nintendo of America.

Q. How long have you been employed by Nintendo of America?

A. Since June of 1981.

Q. What position do you hold at Nintendo of America today?

A. Technical services manager.

Q. Has that been your title since your employment in June of 1981?

A. My title began as service manager.

Q. Have your duties changed between June 1981 and the present?

A. No, they are not.

Q. Would you basically describe what your work at Nintendo consists of?

A. I oversee the repair of printed circuit boards and oversee the parts department.

Q. Mr. Pederson, I am going to put in front of you what has been marked for identification as Defendant's Exhibit's 102, labeled testimony of John Pedersen.

Would you please look at that and tell me

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1 boards, those being a girder board, the rivets board, the
2 elevator board and the conveyor board. The object of the
3 game is to maneuver the men that you control to the top of
4 the screen to save the girl that has been captured by
5 Donkey Kong. While maneuvering to the top of the screen
6 you have to avoid objects such as barrels rolling down,
7 jump over them, fire balls, and picking up prizes along the
8 way, to get to the top.

9 Q. The Colecovision Donkey Kong cartridge and
10 Donkey Kong table top game use the same audiovisual work
11 that is used in the Nintendo coin-op game?

12 A. Yes, it does, but the Colecovision cartridge
13 only contains three of those boards, being the girders
14 board, the rivet board and the elevator board.

15 Q. How many boards are contained in the
16 Colecovision Donkey Kong table top game?

17 A. Just two, the girders board and the rivet board.

18 Q. Is there any reason why the Donkey Kong home
19 video game made by Colecovision only contains three boards
20 rather than the four on the coin-op game?

21 A. Limited size of memory.

22 Q. Is that the same reason why the table top game,
23 the Donkey Kong Colecovision table top game contains fewer
24 boards than the Donkey Kong Colecovision home video game?

25 A. That and the fact that the display medium is

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player here, Mr. Arakawa, who has been identified to the court. Would you please get us to the next board anyway.

MR. KIRBY: This next board, your Honor, is the rivets board as to which Mr. Pederson was testifying. As the maneuverable player moves across the girders which are now horizontal rather than slanted, he knocks out the rivets. Thereafter, once the gap is created he must jump over the gaps. He must also continue to jump over the obstacles, and he gets additional points as he picks up any prizes that happen to be lying around in these ramps.

Your Honor, the next board, if we may, your Honor, let him do more and see if he can show you the next board, and then I think we can move to the next games.

THE COURT: By the way, do you get a stated time when you put the coin in?

MR. KIRBY: No, your Honor. I think you have three players. The man reappears three times and you can keep playing as long as you can keep all three alive, and when and the third one dies, the game is over. So for players like me that might last a minute or less. My son can make it three or four minutes and more experienced players can keep it going for quite some time.

This is now the elevator board, your Honor, the third board and the last board embodied in the Colecovision home cartridge system. Your Honor will note that there are

Pederson - direct

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1 A. Yes, they are.

2 Q. And are those prizes umbrellas and purses?

3 A. Umbrella, shoe, a necklace, and what appears to
4 be a purse.

5 MR. KIRBY: Your Honor, may we now proceed or
6 would you like to see more?

7 THE COURT: No, that is fine, thanks.

8 Q. Mr. Pederson, in your testimony prior to playing
9 the games you described the process of copying a game from
10 the coin-op down to the less memory, less display, less
11 circuitry home video game and to the even more reduced
12 table top game. In your opinion, were the Tiger King Kong
13 games created by somebody sitting down and watching the
14 Donkey Kong game and programming it accordingly?

15 A. Yes.

16 Q. When you were playing the Tiger King Kong games,
17 is the total concept and feel of those games substantially
18 similar to that of the Donkey Kong games?

19 MS. FAUCHER: Objection, your Honor.

20 THE COURT: Overruled.

21 A. Yes.

22 MR. KIRBY: I have no further questions of the
23 witness at this time, your Honor.

24
25 CROSS-EXAMINATION

BY MS. FAUCHER:

Q. Mr. Pederson, Mr. Kirby asked you some questions about the audio visual work that is in, for example, the Donkey Kong arcade game. Is the audio visual work in a game everything that you see and hear when you are playing a game? Is that basically what the audio visual work is?

A. What you see and hear, yes.

Q. It is everything that you see and hear?

A. The audiovisual work is the total concept and feel of the game as you play it.

Q. The audio visual work is the total concept and feel of the game?

A. That is my understanding of it, yes.

Q. I believe in your statement you discussed at a variety of places the audiovisual work in the Donkey Kong game. I am asking if that is everything that you see and hear when you are playing the game.

A. Yes.

Q. You also said in your statement that you understand that Nintendo has a copyright registration for the audiovisual work in the arcade game?

A. Right.

Q. Did you have anything to do with procuring that copyright registration for Nintendo?

A. No, I did not.

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1 at trade shows?

2 A. No.

3 Q. I realize you have played the King Kong table
4 top game and the TV version. Have you played the Quartz
5 Game Clock Game?

6 A. No.

7 Q. No one has asked you to play that game?

8 A. No.

9 Q. You are not familiar with it?

10 A. No.

11 Q. What about the King Kong Hand Help Game?

12 A. No, I am not familiar with that one either.

13 Q. You mentioned before, I believe, on direct

14 testimony that the object of the Donkey Kong game is to

15 maneuver the player to the top of the board to free a girl

16 from the hands of Donkey Kong. I may be paraphrasing a

17 little but do you agree with me that is the object of

18 Donkey Kong?

19 A. That is correct.

20 Q. Having played the Tiger games, do you agree with
21 me the object of the Tiger games is to maneuver the hero to
22 the top of the board to free the girl from the hands of a
23 big gorilla?

24 A. Yes.

25 Q. That is true for both the Tiger home video

Pederson - cross

1 you said, very close in that other lawsuit to everything
2 you see and hear in the Donkey Kong game?

3 A. Substantially similar, yes.

4 Q. And I believe you said in Detroit that meant to
5 you very close.

6 A. It was much closer, yes.

7 Q. But everything you see and hear in the Donkey
8 Kong games you do think is substantially similar to
9 everything you see and hear in the Tiger games that we had
10 before?

11 A. Yes.

12 Q. I believe you also said that you thought that
13 the total concept and feel of the Tiger games and the
14 Donkey Kong games was similar, substantially similar, is
15 that correct?

16 A. Yes.

17 Q. When you say, and you said it in your statement,
18 concept and feel, when you are talking about the concept of
19 the Donkey Kong game, you are talking about the object of
20 the game, that the player is supposed to move up the board
21 to rescue the person from Donkey Kong?

22 A. Yes, that is the concept.

23 Q. And when you say the feel of the game you are
24 talking about the game play or the patterns of movement
25 that we were talking about before, the fact that the player

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1 moves back and forth and up and down the board and avoids
2 obstacles, jumps over obstacles?

3 A. Yes.

4 Q. So that is what you mean when you say concept
5 and feel, you are talking about the object of the game and
6 the patterns and movement of the player?

7 A. Yes.

8 Q. You also mentioned when Mr. Kirby was
9 questioning you, and you certainly said it in your
10 statement, that you keep current with new games that are
11 out on the market, individual arcade games, and you said in
12 your statement home video games and table top games.

13 A. I believe the statement said I was familiar with.

14 Q. And you also said that you keep current with
15 development in the individual arcade industry. I assume
16 that meant new games.

17 A. In the individual arcade games, yes.

18 Q. I am speaking about individual arcade games. I
19 am not going to ask you about Monopoly.

20 Are you familiar with the fact that you can play
21 individual games in the home on a computer too?

22 A. Yes.

23 Q. There is a market for cartridges or discs or
24 whatever where you can, I suppose, play Donkey Kong too,
25 can't you?

1 and memory chips roughly equivalent to what was in the, for
2 example, the Donkey Kong video game; is that correct?
3 That's a different process?

4 A. It's a different process, yes.

5 Q. What is that process, when you go from a game
6 with 28K, 12 memory chips, printed circuitry of a certain
7 type which you can take out and physically examine, when
8 you want to copy from that to another coin game making
9 maybe a few changes or making changes to make it not appear
10 quite as similar, what do you do?

11 A. You would take the memory chips that were
12 contained in the original game, download some of those into
13 a computer, make some slight changes and then program new
14 chips so that the changes would appear on the other game.

15 Q. What about the electronic circuitry, how would
16 you transpose one to the other to copy it?

17 A. You would just physically copy the boards, like
18 a photograph process, and then load in the same circuitry
19 that was on the original board into the board that you have
20 made so that it works identically.

21 MR. KIRBY: I have nothing further, your Honor.

22 THE COURT: Based on what you have just
23 testified to, Mr. Pedersen, do you have a conclusion as to
24 how physically or mechanically, however you want to put it
25 I understand your belief that they are substantially

1 similar, that is the home video games -- do you have a view
2 as to how it was done?

3 THE WITNESS: By looking at a Donkey Kong arcade
4 game and programming into -- a programmer sitting down and
5 trying to reproduce what was on the diagnosis arcade game.

6 THE COURT: But not through a physical
7 examination of the chips or the PC boards?

8 THE WITNESS: No.

9 RECROSS-EXAMINATION

10 BY MS. FAUCHER:

11 Q. That lawsuit you testified in Detroit against
12 the Crazy Kong game that I think you said was an arcade
13 game?

14 A. Yes.

15 Q. In that case was it your belief the copying was
16 done by downloading the chips into the computer and then
17 replicating them in the Crazy Kong game?

18 A. The circuitry on the Crazy Kong game was
19 different. I did not have a chance to examine it to see
20 how close it was to a Donkey Kong game.

21 Q. So you don't have an opinion as to how the game
22 was copied?

23 A. No.

24 THE COURT: Thank you, Mr. Pedersen.

25 (Witness excused)

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1 MR. KIRBY: Your Honor, I have discussed with
2 Mr. Fairhurst one issue and that is that in our
3 interrogatory requests we have asked them and they have
4 supplied and periodically updated the royalty information
5 with respect to royalties received from Atari by Universal,
6 Coleco, Ruby Spears and Tiger. Based on our discussions,
7 it's apparent that there is very little updating to do as
8 of the date of this trial and he has agreed to do any
9 updating that is required and subject to that updating and
10 introducing that into the record Nintendo rests.

11 MR. FAIRHURST: Your Honor, with this point, we
12 would move to dismiss all of the claims and if your Honor
13 wants to give me an oral argument on any of them I would be
14 willing to give it.

15 THE COURT: I don't think so. Thank you. I
16 understand the nature of the motion. I can imagine, given
17 the clarity and vigor of your opening statement, what the
18 motion would be and it's denied.

19 MR. FAIRHURST: At this point Universal would
20 commence its own direct case and I think we'll start by
21 putting in evidence the exhibits that your Honor does not
22 now have before him and to which there may or may not be
23 some objection. I don't think there are very many.

24 We have designated as to Plaintiff's Exhibit A
25 an index of the documents and deposition exhibits in the

1 to, the Universal designation of deposition testimony and
2 other evidence from the clerk's record.

3 (Plaintiff's Exhibits 1 through 107 for
4 identification were received in evidence)

5 MR. FAIRHURST: So your Honor has a complete set
6 of exhibits, Plaintiff's Exhibits 92 through 107 were
7 recently designated and it is a supplemental to the other
8 exhibit booklets.

9 Finally, deposition excerpts that Universal
10 would refer to and Nintendo's interrogatory responses.

11 I am going to call my first witness, if I may.

12 THE COURT: Fine.

13 MR. FAIRHURST: Joseph V. DiMuro.

14 JOSEPH V. DIMURO,

15 called as a witness by plaintiff defendant, having

16 been duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. FAIRHURST:

19 Q. Mr. DiMuro, would you please tell the court what
20 your present relationship with Universal City Studios is?

21 A. I am a consultant under a contract which goes
22 back to April 1, 1977. Under this arrangement, I am
23 employed or rather engaged as an independent contractor to
24 render services for Universal City Studios, Inc. and these
25 duties encompass doing assignments for various executives

1 of the company on a one to one level, drafting contracts,
2 making legal decisions with respect to these matters and if,
3 in my judgment, an opinion of outside counsel might be
4 required, contacting outside counsel and getting the
5 necessary opinion.

6 Q. At some point in time, Mr. DiMuro, did you serve
7 Universal in a different capacity?

8 A. Yes, I did.

9 Q. What was that?

10 A. I was approached by Universal or rather MCA in
11 1964 to join their legal staff. I joined MCA in October of
12 1964 and continued as an employee of MCA until March 31,
13 1977. In January of 1972, I was appointed house counsel or
14 head of the law department and I held that position as
15 house counsel until I reached mandatory retirement age on
16 December 25, 1976. But I actually held over in that
17 capacity until March 31, 1977.

18 Q. Prior to joining the Universal legal department
19 in 1964, you were on the legal department of 20th Century Fox?

20 A. That is correct.

21 Q. How long had you worked at Fox?

22 A. I joined the 20th Century Fox law department in
23 1950 and was there for a period of 14 years until 1964 when
24 MCA approached me for a position with the MCA law
25 department.

1 of distribution rights in that motion picture. I will
2 prepare a contract evidencing that arrangement.

3 Q. Now, at some point while you were at Universal
4 serving as a legal advisor, you became involved in
5 litigation representing Universal, assisting Universal,
6 with RKO over King Kong?

7 A. That's correct.

8 Q. Would you please tell us when you became
9 involved in King Kong litigation for the first time?

10 A. Beginning in 1975. The genesis of the
11 litigation came about because Universal believed it had an
12 oral contract with RKO to do a remake of the 1933 RKO
13 classic King Kong.

14 Shortly after this oral contract, RKO granted a
15 license to Dino DiLaurentiis to produce a remake of King
16 Kong and at that point Universal initiated a breach of
17 contract action against RKO and Dino DiLaurentiis
18 Corporation and Dino DiLaurentiis in the Superior Court,
19 Los Angeles, California.

20 Q. You stated Universal initiated the state court
21 action. Who were your attorneys that filed that action?

22 A. That action was filed by Universal's outside
23 counsel, Posenfeld Meyer and Susman.

24 Q. This is a law firm in Los Angeles?

25 A. A law firm located in Beverly Hills, California.

1 Q. Now, during the course of that litigation
2 Universal was represented by that law firm. Was there one
3 particular lawyer who handled most of the litigated matters
4 for Universal?

5 A. Yes. In that litigation Steven Kroft, a partner
6 in the Rosenfeld firm, handled the state court action.

7 Q. You said that Universal had struck an oral deal
8 I don't know if you used the term oral deal, but thought it
9 had a deal with RKO to make a remake of the of the 1933
10 picture, did Universal thereafter think it had that deal
11 when Universal began to do development work on such a
12 picture?

13 A. In June of 1975, after I had reviewed a
14 Brylawski -- Mr. Brylawski is an attorney in Washington,
15 D.C. who renders a service to the motion picture companies
16 with respect to the copyright status of properties which a
17 particular studio may be interested in purchasing.
18 Universal requested a report as to the copyright status of
19 the King Kong story and based on our evaluation of that
20 Brylawski report. It appeared to me that perhaps the
21 renewal copyright -- the original King Kong story was
22 published by Crossett & Dunlop in 1932 and was copyrighted
23 in the name of that publisher.

24 In 19609, Patricia Frere, a daughter of Edgar
25 Wallace, filed an application for the renewal of that

1 copyright with the U.S. Register of Copyrights in
2 Washington, D.C. I felt that Miss Frere was not the proper
3 party to file the renewal application, that she was not the
4 proper party to renew inasmuch as the copyright inhered in
5 Grossett & Dunlop and we could find no evidence of an
6 assignment from Grossett & Dunlop, the publisher, to Miss
7 Frere.

8 I consulted professor Melville Nimmer, who is a
9 professor at UCLA School of Law and asked him if he agreed
10 with my opinion that the copyright renewal by Miss Frere
11 was inappropriate.

12 Professor Nimmer studied the matter and gave us
13 a written opinion to the effect that, indeed, based on the
14 information that was then available that the attempted
15 renewal by Miss Frere was invalid.

16 (Continued on next page)

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1 Q. Have you finished your answer?

2 A. Yes.

3 Q. Subsequently, Universal filed a federal action
4 against RKO, did it not?

5 A. Right, based in part upon this opinion of
6 Professor Nimmer Universal filed a declaratory relief
7 action against RKO and Dino De Laurentis Corporation,
8 seeking a determination that the King Kong story be
9 adjudged in the public domain by reason of a defective
10 copyright renewal.

11 Q. What was happening with respect to the picture
12 that Universal was planning to do, based on a remake -- not
13 based on -- the picture that would have been a remake of
14 the 1933 RKO King Kong?

15 A. Concurrently with these events, Universal had
16 elected to proceed with the production of a motion picture,
17 and in discussions with our insurance carrier was able to
18 obtain what we call production cost insurance for the
19 production of this motion picture, and with that insurance
20 in hand Universal proceeded to engage a screenplay writer
21 for the writing of the screenplay for the motion picture.

22 Q. What happened after that?

23 A. As it turned out, the screenplay writer made the
24 unfortunate mistake of screening the RKO 1933 motion
25 picture and the insurance carrier took the position that

1 this was a violation of the terms of the production cost
2 insurance, and on that basis denied coverage, and in that
3 situation Universal decided to abandon the project.

4 Q. As this litigation went on in California in the
5 state court for breach of contract and in the federal court
6 seeking a declaratory judgment as to the invalidity of the
7 underlying King Kong story under copyright, what was your
8 role in that litigation? I use that word role in the
9 broadest sense of the term. What did you do to assist
10 Universal, if I may, in prosecuting, mostly prosecuting,
11 but also defending the claims against it by RKO?

12 A. During this period I was house counsel and head
13 of the law department. I analyzed the Velsky copyright
14 report, I obtained the opinion of Professor Nimmer, I was
15 involved in the analysis and review of findings of fact and
16 conclusions of law, I made suggested revisions -- let me
17 rephrase that. I suggested revisions of these documents.

18 Q. Did you see the pleadings -- I am sorry.

19 A. I also reviewed the complaints which were filed
20 and various pleadings that were filed in the course of the
21 litigation.

22 Q. Did you assist Mr. Kroft in getting documents
23 and answering document requests and interrogatories and so
24 forth?

25 A. Yes. In addition to what I have just testified

1 to I was the liaison with the Rosenfeld, Meyer Susman
2 office in obtaining information for any interconnections and
3 in collecting that information for submission to Mr. Kroft.

4 Q. Insofar as you had occasion to report
5 developments of that lawsuit as they were proceeding
6 between 1975 and the end of it, really, which is through
7 1980, to whom did you report internally?

8 A. I reported to Mr. Sid Sheinberg, the president
9 of MCA, and to Mr. lieu Wasserman, the chairman of the
10 board of MCA.

11 Q. Did there come a time when that litigation all
12 came to an end in some way?

13 A. Yes.

14 Q. Would you tell us as briefly as you can, without
15 trying to summarize the multiplicity of documents and
16 everything, what the gist of the settlement was as you
17 understood it.

18 A. The gist of the settlement agreed to by Mr.
19 Sheinberg for Universal and Mr. O'Neal of RKO was that the
20 various lawsuits would be dismissed. Universal executed a
21 release in favor of RKO and RKO in turn released Universal.
22 This goes into the terms of the settlement agreement of
23 June 4, 1980. Under that agreement RKO agreed that
24 Universal could produce motion picture photoplays utilizing
25 the King Kong character and the King Kong story and the

1 King Kong name, and these photoplays as well as the King
2 Kong character could be substantially similar to the 1933
3 RKO motion picture or the succeeding RKO picture called Son
4 of Kong.

5 The only prohibition in this settlement
6 agreement was that Universal could not make a verbatim copy
7 of the King Kong character as it appeared in the 1933 movie,
8 nor could Universal take clips or extracts from the 1933
9 movie or the sequel to that movie produced by RKO and use
10 those clips from those pictures.

11 Q. Aside from the settlement with RKO to which you
12 have referred in June 1980, were there also agreements
13 undertaken with others who had rights in King Kong?

14 A. Yes.

15 Q. What were they, the principal ones? Don't tell
16 me everything.

17 A. Right. The basic agreement is the agreement in
18 December of 1976 between Universal and Major Richard Cooper,
19 the son of Marion Cooper, the author of the King Kong story
20 along with Edgar Wallace. Under this agreement Universal
21 acquired all of Cooper's rights in the main character and
22 story King Kong, and could exercise these rights without
23 limitation, except for the fact that Major Cooper reserved
24 the publishing rights in the King Kong story.

25 Q. By which you mean book publishing rights?

1 A. Book publishing rights.

2 As a preface to this agreement let me mention
3 that Judge Real in the U.S. District Court declaratory
4 relief action found that as between Major Cooper and RKO
5 Major Cooper retained all rights into the name, character
6 and story King Kong, all merchandising rights including the
7 good will from the exercise of these merchandising rights,
8 and RKO simply had an one-picture license to do the 1933
9 King Kong movie and the sequel to that movie called Son of
10 Kong.

11 This judgment was part of the chain of title in
12 the rights which Universal acquired from Major Cooper.

13 Q. In other words, you had a judgment issued by
14 Judge Real on Cooper's claims against RKO as one part of
15 the chain of title, an agreement between Cooper and
16 Universal as a second part, and a subsequent settlement
17 agreement with RKO, is that correct?

18 A. That is correct.

19 Q. At the time, Mr. DiMuro -- when I say at the
20 time, say 1980 -- I am going to try and fix on a point --
21 did you have an understanding of any kind as to whether RKO
22 or its licensees were actually exploiting these
23 merchandising rights?

24 A. The merchandising rights under Judge Real's
25 judgment in favor of Richard Cooper, RKO was the

1 constructive trustee for the benefit of Major Cooper, and
2 RKO was required to transfer all merchandising licenses to
3 Major Cooper, not one or two licenses, the totality of the
4 licenses and its entire merchandising business, and the
5 good will generated by that business.

6 Q. Did you know then whether there were products
7 and services on the market being sold by anyone with the
8 word King Kong or King Kong gorilla on them?

9 THE COURT: Let's be a little careful about the
10 "then."

11 Q. When I say then, I mean in 1980 first when RKO
12 entered into the settlement agreement with Universal.

13 A. Yes, there had been an extensive merchandising
14 program by Paramount Pictures Corporation which was the
15 United States distributor of the 1976 De Laurentis movie,
16 the King Kong movie, and we were well aware of this
17 merchandising activity and the good will generated by it.

18 Q. Did you have occasion to deal with RKO, DDLC --
19 by which I mean Dino De Laurentis Corp. I think it would
20 be helpful if you put DDLC, Madam Reporter -- and Paramount
21 in 1980 with respect to their merchandising activities? I
22 am going to use the word deal in the broadest sense to let
23 you tell us what you knew about it or what your dealings
24 were.

25 A. Yes, I did.

1 Q. What was the nature of those dealings?

2 A. I sent notices out to Lou Petrich --

3 Q. Identify him, please.

4 A. Lou Petrich, the firm of Youngman Hundate and
5 Leopold, the attorneys for RKO. And I notified Mr. Petrich
6 that RKO's rights, merchandising rights, as well as the
7 merchandising rights of Dino De Laurentis Corporation and
8 Paramount Pictures Corporation, with respect to the 1976
9 movie had expired as of December 1969 and that Universal
10 intended to begin the exploitation of these merchandising
11 rights.

12 Q. You said '69. You meant '79, did you not?

13 A. '79, I am sorry.

14 Q. I put in front of you what has been marked as
15 Plaintiff's Exhibit 6. Is that the correspondence you had
16 with Mr. Petrich on the subject?

17 A. Yes, it is.

18 Q. Do you recall whether you wrote to others
19 involved in King Kong merchandising at that time, and I
20 again mean July 1980?

21 A. Yes. I wrote to Mr. Fred Sidewater, the senior
22 executive of Dino De Laurentis Corporation, and I wrote to
23 Paramount Pictures Corporation.

24 Q. That was Mr. Ralph Kamon at Paramount?

25 A. That is correct.

1 Q. Let me put in front of you what has been
2 identified in the case of Mr. Kamon as Plaintiff's Exhibit
3 5, and in the case of Mr. Sidewater, Plaintiff's Exhibit 4.
4 We now have 4, 5 and 6.

5 You wrote all these people at that time
6 apprising them of Universal's intention to begin the
7 exploitation of its merchandising rights in King Kong, is
8 that correct?

9 A. That is correct.

10 Q. Prior to writing that memorandum, Mr. DiMuro,
11 did you have occasion to advise your client, Mr. Sheinberg,
12 as to whether Universal could proceed to exercise
13 merchandising rights?

14 A. Yes, I did.

15 Q. Do you remember when that was?

16 A. Yes. That was in June of 1980.

17 Q. Let me put before you what has been marked for
18 identification and offered in evidence as Plaintiff's
19 Exhibit 3. You will note the first paragraph of the
20 memorandum, which is from Mr. DiMuro to Mr. Sheinberg, and
21 I am not going to read off the carbon copy recipients,
22 subject is King Kong merchandising rights, and it says:
23 "This will reply to your inquiry regarding the King Kong
24 merchandising rights."

25 Would you tell us, Mr. DiMuro, what you recall

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1 today of what that inquiry was by Mr. Sheinberg.

2 A. Mr. Sheinberg telephoned me and stated that he
3 wanted to know what merchandising rights Universal had in
4 King Kong because he planned to have Universal's
5 merchandising arm, Merchandising Corporation of America,
6 exploit these rights. I reviewed the documents which are
7 set out in this memorandum of June 18, 1980, and after a
8 review of these documents I gave an opinion in my
9 memorandum that the merchandising rights of Paramount and
10 Dino De Laurentis Corporation expired by December 1979 and
11 that Universal was free to exercise the merchandising
12 rights after that date.

13 Q. Contemporaneous with writing that memorandum to
14 Mr. Sheinberg, did you have occasion to discuss the matter
15 of merchandising rights with anyone else within Universal?
16 I don't mean your outside counsel at this moment, I mean
17 inside Universal.

18 A. I am not quite sure.

19 Q. Maybe I can clear up the question. In writing
20 the memorandum did you consult with others at Universal
21 inside?

22 A. No, I did not.

23 Q. Did you consult with anyone outside?

24 A. I believe I discussed the subject of the
25 memorandum with Steve Kroft, our outside counsel, prior to

1 the writing of this memorandum.

2 Q. Subsequent to the writing of the memorandum did
3 you discuss the contents of that memorandum with anyone?

4 A. Yes, I did.

5 Q. With whom?

6 A. Loretta Sifuentes.

7 Q. Could you tell us what her position then was?

8 A. Loretta Sifuentes in 1980 was a member of the
9 merchandising department, Merchandising Corporation of,
10 America, and she worked with Steve Adler in connection with
11 the merchandising of various Universal pictures like Jaws
12 and pictures of that sort.

13 Q. Who is Mr. Adler?

14 A. Steve Adler was in charge of the merchandising
15 department at that time.

16 Q. Did Miss Sifuentes report directly to you?

17 A. She did not.

18 Q. Who did she report to?

19 A. Excuse me. At one point she was in the law
20 department.

21 Q. But that was prior to that.

22 A. She would have reported to me at that time. In
23 this period, June 1980, she would not have reported to me,
24 no.

25 Q. In point of fact you did hire Miss Sifuentes,

1 did you not?

2 A. Yes, I did, when I was house counsel.

3 Q. Before you wrote your letter to Mr. Petrich in
4 July, did you discuss with Mr. Kroft your advising Mr.
5 Petrich, Mr. Karon and Mr. Sidewater of Universal's
6 intention to exploit these merchandising rights?

7 A. Yes, I believe I did.

8 Q. Do you recall receiving -- I will put in front
9 of you what has been marked for identification as
10 Plaintiff's Exhibit 92 and also while I am at it
11 Plaintiff's Exhibit 93, letters from Mr. Kroft to Mr.
12 DiMuro on the dates recited in the exhibits.

13 Do you recall discussing the the matter of when
14 Universal could begin exercising these Universal
15 merchandising rights?

16 A. I had referred to the documents in the
17 memorandum, so I was satisfied as to the dates but I
18 believe that I also checked out my interpretation of the
19 documents with Mr. Kroft.

20 Q. Are the sum and substance of Mr. Kroft's
21 thoughts on it reflected in the two exhibits I just put in
22 front of you?

23 A. Yes, they are.

24 Q. Talking about the merchandising rights, and this
25 is what you advised Mr. Sheinberg about and this is what he

1 inquired about and this is what he wrote to you on, would
2 you tell us, Mr. DiMuro, what you understand merchandising
3 rights to mean.

4 A. The merchandising rights which Mr. Sneinberg was
5 interested in and as understood in the industry would be
6 the right to use or to license the use of the name or
7 likeness of a character from a movie on or in connection
8 with a product such as games, toys, posters, T-shirts,
9 other items of wearing apparel, and the right to sell these
10 items with the movie character's name or likeness on them.

11 The character can be an inanimate character like
12 King Kong, or like the Universal Jaws merchandising
13 campaign, or Universal's ET merchandising campaign, or the
14 character may be an actor like Robert Duvall playing
15 Sherlock Holmes.

16 Q. Do you recall whether you received a response
17 from RKO or Dino De Laurentis or Paramount in respect to
18 the letters that you sent out?

19 A. I recall that I received a response from Mr.
20 Kamon at Paramount Pictures Corporation.

21 Q. Let me show you an exhibit that is marked
22 Plaintiff's Exhibit 95 and ask you if that is the response
23 that you referred to. It is not Mr. Kamon, it is Mr. Cosby,
24 but he is at Paramount also?

25 A. Yes, he is.

Q. Did you discuss with Mr. Cosby the contents of Plaintiff's Exhibit 95?

A. I remember this letter but I don't recall that I specifically discussed it with Mr. Cosby. The letter seems clear on its face and there would be no reason to discuss it with him, that I can see.

Q. You told us a few minutes ago that you had a discussion that you recall with Miss Sifuentes sometime after you sent your memo to Mr. Sheinberg -- that is Plaintiff's Exhibit 3. Do you have that in front of you still?

A. Yes, I have it here.

Q. What do you recall, as best you can tell us now, about that discussion?

A. The conversation was shortly after my writing of the June 18, 1980 memo. I received a call from Mrs. Sifuentes, who was then working with Steve Adler in the merchandising department. Mrs. Sifuentes said to me, "I have read your memorandum of June 18, 1980 to Mr. Sheinberg. I take it this means that Universal has the right to merchandise King Kong."

I said, "That is correct," and that was the substance of the conversation.

Q. Did you have any discussion with her at that time as to exactly what that meant in practical terms?

1 virtually contemporaneous with sending the memorandum and
2 we will put it arbitrarily at July 1, 1980.

3 Do you recall any discussions during the summer
4 of 1980 having to do with the actual implementation of
5 these merchandising rights pursuant to the memo?

6 A. I do not.

7 Q. Did there come a time when you had occasion to
8 discuss the subject of merchandising rights possessed by
9 Universal with others outside of Universal and its family?
10 By that I mean the Universal umbrella of companies and its
11 outside counsel. That is the family to which I have
12 referred.

13 A. Over what period of time are we talking about
14 now?

15 Q. I will try to do it in segments, sometime
16 subsequent to June or July 1980.

17 A. I had a request from Mrs. Sifuentes subsequent
18 to September 1981, asking for assistance in getting some
19 copyrighted stills from RKO, that is, stills of the 1933
20 motion picture, because it seemed that in some of our
21 merchandising arrangements some of the potential licensees
22 were particularly interested in the still copyrighted by
23 RKO of the gorilla on top of the Empire State Building.

24 MR. KIRBY: Your Honor, I object and move to
25 strike that. It is totally nonresponsive to the question.

1 BY MR. FAIRHURST:

2 Q. Let me ask you, do you recall ever discussing
3 the contents of Exhibit 96 with Mr. Regan?

4 A. Yes, I do.

5 Q. What do you recall about the conversation?

6 MR. KIRBY: Objection.

7 THE COURT: Overruled.

8 A. I recall I took the position that in any
9 merchandising relating to the name or character King Kong
10 that Universal had the totality of these rights. However,
11 if the potential licensee wanted a copyrighted RKO still in
12 connection with that specific merchandising arrangement
13 that the consent of RKO would be required.

14 Mr. Regan took the position in addition to RKO's
15 consent being required for the use of the copyrighted still
16 that RKO possibly had the right to use that still anyway it
17 felt and I disagreed with him that if the use of the still
18 involved a merchandising operation that RKO had no such
19 right.

20 Q. Did you have any disagreement with Mr. Regan
21 over the use of the King Kong name for merchandising
22 purposes?

23 A. Not at all, never.

24 Q. Did that ever come up? Was there ever at any
25 time, as far as you can tell us, any quarrel with Mr. Regan

5
1 or anyone else, any dispute, as to who had the right to use
2 the King Kong name in merchandising?

3 MR. KIRBY: Objection

4 THE COURT: Overruled.

5 A. It was clearly understood by Universal and
6 agreed to by -- and never challenged by Mr. Regan or anyone
7 else that Universal had the unrestricted and unlimited
8 right to use the King Kong name in any form of
9 merchandising.

10 Q. Now, this was in October of 1981 that you wrote
11 this memo. What was your relationship, business, working
12 relationship, at that time with Merchandising Corporation
13 of America, by which I mean, so you can understand the
14 question, did you have occasion to work with them on a
15 daily basis or did you field inquiries from time to time as
16 they may arise, depending on what the nature of the inquiry
17 was?

18 MR. KIRBY: Objection, the leading should stop.

19 MR. FAIRHURST: It is not a leading question.
20 It's a direct question.

21 MR. KIRBY: It's three leading questions.

22 MR. FAIRHURST: I am trying to define working
23 relationship and not leave it ambiguous. If I use that
24 term without the description, the witness could testify to
25 something which would be totally misleading if we weren't

1 both working off the same vocabulary and that is not a
2 leading question.

3 MR. KIRBY: Your Honor, I could suggest that one
4 way to cure that is by asking a precise question, rather
5 than three leading ones, so that the witness would
6 understand and indeed I would have the opportunity of
7 understanding in order to determine whether or not I wish
8 to object to the question.

9 THE COURT: Overruled.

10 A. I have no --

11 Q. Do you still know the question, Mr. DiMuro?

12 A. Please, reread to it me.

13 THE COURT: There's a risk in that. It might be
14 sustained on rereading.

15 Q. Mr. DiMuro, do the best you can.

16 A. I had a relationship with all of the departments
17 and still have a relationship with all of the departments
18 at the studio, if they need my advice they can ask for it.
19 But depending on the matter that I am handling, I can't say
20 that I have a day to day relationship with any department.
21 It just depends on what work I am doing at the time.

22 Q. I take it from your testimony that you don't
23 work as a legal advisor of the merchandising department?

24 A. Of course not.

25 Q. At any time in your working at Universal in the

last three or four years, has it been your responsibility to secure trademark recommendations for Universal trakemarks?

A. No.

Q. I take it then that you did not have anything to do with the securing or application for trademark recommendations for any King Kong properties?

A. That is correct.

Q. Did you subsequently learn there were such things after the fact?

A. Yes, I did.

Q. Was that mostly in the course of this litigation?

A. Yes, it was.

Q. Were you aware prior to the institution of this lawsuit, June 1982, of what trademark registers Universal held for anything?

A. I was not.

Q. You have read Ms. Sifuentes' deposition testimony in this case, both volumes, volume one and volume two?

A. Yes, I have.

Q. You were aware she gave testimony on one occasion and was subsequently redeposed?

A. Yes.

Q. You read that deposition testimony prior to your

1 being denosed yourself in this action, correct?

2 A. That is correct.

3 Q. You are aware that Miss Sifuentes has testified
4 to having had a discussion with you sometime in February or
5 early March 1982 relative to King Kong, are you not?

6 A. I am aware that that's in her deposition, yes.

7 Q. You are aware that she testified in substance
8 that she had a telephone conversation with you in which a
9 decision was reached by you that Universal did not have
10 merchandising rights or trademark rights, rights of any
11 kind to merchandise King Kong property?

12 A. I am aware she made at that statement.

13 MR. KIRBY: Objection to the paraphrase, your
14 Honor.

15 MR. FAIRHURST: If you want I will read the --

16 THE COURT: It's not necessary.

17 MR. FAIRHURST: I am trying for the gist of it.
18 I can read the exact statement.

19 THE COURT: It's not necessary. Overruled.

20 Q. You are aware of that?

21 A. I am aware of it.

22 Q. Did you ever have that discussion, to which she
23 testified, with Miss Sifuentes at any time?

24 A. I did not.

25 Q. Did you ever come to a decision that Universal

1 did not have rights to license in King Kong?

2 A. I did not.

3 Q. Would you, if you could have come to that
4 decision --

5 MR. KIRBY: Objection.

6 THE COURT: Sustained.

7 Q. Let me do it a different way.

8 Aside from your testifying that you didn't have
9 that conversation, what would you have have had to do if
10 you were going to make a decision like that within the
11 corporation, what procedures would have been followed?

12 A. A decision of this sort would not have been made
13 in a vacuum. It would have involved consultation with the
14 present house counsel, Mr. Mittleran. Because of Mr.
15 Sheinberg's ongoing interest in King Kong, going back to
16 1975, it would certainly have involved Mr. Sheinberg.

17 It would have involved a senior executive of the
18 accounting department, in terms of the particular person
19 who is responsible for merchandising receipts and it would
20 have involved written memoranda that this decision had been
21 made and distribution within the company of that decision.

22 Q. You didn't reach that decision then. Has there
23 been any time, Mr. DiMuro, when you personally reached such
24 a decision?

25 A. I did not.

1 Q. Did you ever advise Miss Sifuentes that you had
2 reached such a decision?

3 A. I did not.

4 MR. KIRBY: Asked and answered.

5 Q. Did you ever advise anyone else in Universal or
6 MCA that you had reached such a decision?

7 A. Never, I did not.

8 Q. Do you recall discussing with Miss Sifuentes the
9 subject of Tiger's agreement with Universal under which
10 Tiger was licensed to make a King Kong cassette game and a
11 King Kong tabletop game? You were sitting here in court
12 this morning, so you saw the games?

13 A. Yes, there was a time when Miss Sifuentes
14 contacted me, sometime prior to May of 1982 I believe. She
15 was concerned that the Tiger people had not submitted any
16 prototypes, had not submitted any art work or advertising
17 formats in connection with their licensing of King Kong and
18 she asked me if Tiger's failure to submit these items might
19 be grounds for termination of the Tiger license agreement.

20 I reminded Miss Sifuentes that in the boiler
21 plate of the license agreements that we use there is a
22 requirement on the part of the licensee to furnish these
23 items in advance of the manufacture of any of the articles
24 covered by the license agreement and I advised Miss
25 Sifuentes that in my opinion this constituted a breach by

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1 Tiger and, indeed, could be grounds for termination of the
2 license agreement.

3 Q. Have you yourself, Mr. DiMuro, participated in
4 the drafting of the licensing agreements with Universal
5 King Kong licensees?

6 A. Yes. In 1983 --

7 Q. After this lawsuit was commenced?

8 A. Oh, yes. In 1983 I was involved in the
9 preparation of a license authorizing a San Diego company,
10 Robert Keith and Company to manufacture a huge inflatable
11 replica of King Kong to celebrate the 50th anniversary of
12 the release of the 1933 motion picture.

13 Q. That was the big balloon that didn't work too
14 well?

15 A. On top of the Empire State Building. I
16 personally prepared that license agreement for a stated
17 consideration. It was executed by Universal or
18 Merchandising Corporation of America. I don't have the
19 agreement in front of me and the inflatable balloon went up
20 on the Empire State Building. I don't know how successful
21 it was. It went up.

22 I also, subsequent to that, advised one of my
23 associates, Mr. Kricun with respect to granting a King Kong
24 license to the Phillips organization. That license
25 agreement was executed and subsequent to that --

1 Q. What was the Phillips organization, just so we
2 understand?

3 A. The Phillips organization also had an inflatable
4 type balloon of King Kong.

5 Subsequent to that, Mr. Kricun asked me for my
6 advice on a situation in Southern California where a
7 company called Sluggo was using the King Kong name in
8 connection with the sale of giant hamburgers or hot dogs
9 and I -- a cease and desist letter was sent out.

10 Q. I was asking on licensing.

11 MR. KIRBY: Your Honor, I object and move to
12 strike not because I do want to impede the testimony but
13 because we do need a question and answer. The question was
14 licensing. The witness is now -- in effect, it's like
15 pushing a button and we are getting everything he had to do
16 thereafter and so I move to strike that.

17 THE COURT: I'll let it stand.

18 Q. Now, during the course of your involvement with
19 King Kong rights you've had occasion to advise others in
20 Universal with respect to what use or what use Universal
21 could not make of the RKO picture; is that correct?

22 A. That is correct, yes.

23 Q. Have you given advice to the people who operate
24 the Universal tour with respect to manufacture of a King
25 Kong character at that tour?

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19 King Kong rights you've had occasion to advise others in
20 Universal with respect to what use or what use Universal
21 could not make of the RKO picture; is that correct?

22 A. That is correct, yes.

23 Q. Have you given advice to the people who operate
24 the Universal tour with respect to manufacture of a King
25 Kong character at that tour?

1 A. Yes, I have.

2 C. In substance, what was the advice? In substance,
3 what was the nature of your advice?

4 A. The nature of the advice was that in doing a
5 mock-up of King Kong or building an actual King Kong
6 monster that we should not slavishly copy the RKO King Kong
7 or the DiLaurentiis King Kong. This was my conservative
8 opinion that we would be better off if we built our own.

9 Q. Didn't you at some point advise that the making
10 of a generic ape that looked nothing like the RKO picture,
11 nothing like the Dino DiLaurentiis ape in that picture?

12 A. Yes, I recall.

13 Q. You have given that advice to others?

14 A. Yes.

15 Q. What's the concern to which you are addressing
16 that advice if I may be so bold to lead you that way?

17 MR. KIRBY: Objection.

18 THE COURT: Overruled.

19 A. It's a matter of copyright. Universal should
20 not be in a position of copying a copying the RKO gorilla
21 or the DiLaurentiis gorilla to the point that it would be
22 substantially similar and, therefore, objectionable.
23 Although, as I have testified before, the June 4, 1980
24 agreement gave us that leeway. I want to emphasize that.

25 Q. You at some point advised Mr. Sheinberg on the

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1 subject of making a new King Kong motion picture what
2 Universal's concerns ought to be, did you not?

3 A. Yes, I did.

4 Q. Let me put in front of you what's been marked as
5 Defendant's 89 and ask you if you recognize that as your
6 advice to Mr. Sheinberg on that date with respect to
7 Universal's position with respect to dealing with Dino
8 DiLaurentiis in the production of a new motion picture film
9 of King Kong?

10 A. Yes, I recall this.

11 Q. I want to specifically direct your attention,
12 Mr. DiMuro, to the attachment which is denoted King Kong
13 guidelines.

14 A. Yes.

15 Q. Do you recall whether you ever had occasion to
16 discuss those guidelines with someone who was actually
17 making a picture?

18 A. No, I don't recall that.

19 Q. So you drafted these, presented them, as it were,
20 to Mr. Sheinberg and as far as you know you never actually
21 had occasion to counsel on this particular memo?

22 A. Well, with one qualification. There was in the
23 works an Universal project called The Son of King Kong. I
24 am not sure if that's the precise title.

25 In any event, it was a production that Jennings

1 Lang was involved in and he consulted me about it and I
2 don't recall -- I believe -- yes, I believe that this memo
3 was initiated by reason of the Jennings Lang project.

4 Q. Do you actually recall consulting with Mr. Lang
5 on guidelines at all?

6 A. Yes, I do.

7 Q. What was the substance of that consultation?

8 A. I didn't hear you.

9 Q. I said what was the substance of that
10 consultation.

11 What did Mr. Lang ask you and what did you tell
12 him?

13 MR. KIRBY: Objection.

14 Q. What did you tell him? That's fine.

15 MR. KIRBY: There's no foundation as to who Mr.
16 Lang is and what his relationship with Universal is either.

17 THE COURT: Overruled.

18 MR. FAIRHURST: I will establish the foundation.

19 Q. Who is Jennings Lang?

20 A. Jennings Lang is an executive at MCA. He is a
21 producer. He produced the Airport pictures and the sequels
22 to the Airport pictures and several other Universal
23 photoplays.

24 Q. What did you tell Mr. Lang when you had this
25 consultation?

1 A. Well, I think, basically, I told him to stay
2 away from the RKO gorilla and the DiLaurentiis gorilla.
3 But again I repeat that we had the right to come very close
4 to the RKO gorilla under the RKO/Universal settlement
5 agreement. This was my conservative approach to the
6 production to avoid any problems down the road.

7 THE COURT: How much longer do you think you
8 will be?

9 MR. FAIRHURST: I am about 30 seconds away from
10 concluding my direct examination. I have to tie up a loose
11 end here. I believe it's a potential loose end.

12 Q. Mr. DiMuro, I put in front of you before
13 Exhibits 93 and 94.

14 When you received Mr. Kroft's letter, which is
15 Exhibit 93, on June 24, 1980, can you tell us that Mr.
16 Petrich's letter was attached to it? That's all I'm asking.
17 They are marked as separate exhibits. That's why I am
18 doing that. If you can recall.

19 (Pause)

20 A Yes, I recall this as being attached to the
21 Steve Kroft letter to me of June 24, 1980, this letter of
22 June 20, 1980 from Lou Petrich to Kroft. I recall it being
23 attached.

24 MR. FAIRHURST: No further questions.

25 THE COURT: We'll take a brief recess.

1 (Recess)

2 CROSS-EXAMINATION

3 BY MR. KIRBY:

4 Q. Mr. DiMuro, you have been designated by
5 Universal, have you not, to be the contact person for Mr.
6 Fairhurst in connection with the Nintendo litigation?

7 A. Not specifically, no.

8 Q. Have you been responsible for supervising the
9 gathering of materials in response to document requests
10 made by Nintendo?

11 A. That's correct.

12 Q. Have you been responsible for assisting Townley
13 & Updike in the preparation of answers to interrogatories?

14 A. That's correct.

15 Q. Have you reviewed interrogatory answers as they
16 have been prepared?

17 A. Yes.

18 Q. Have you read the trial briefs submitted by the
19 parties in this action?

20 A. Yes, I have.

21 Q. Did you read the summary judgment motion filed
22 by Nintendo at or about the time it was filed?

23 A. I believe I did.

24 Q. Did you read the response of Universal filed by
25 Townley & Updike at or about the time it was filed?

1 A. Yes, I did.

2 Q. Did you assist in the preparation of that
3 response?

4 A. I did not.

5 Q. Have you read depositions in connection with
6 your assistance to Mr. Fairhurst in this action?

7 A. I didn't hear you.

8 Q. Have you read depositions taken in this action
9 other than the deposition of Miss Sifuentes which you have
10 testified you have read?

11 A. I have not.

12 Q. Your deposition was taken recently in this
13 action, wasn't it, Mr. DiMuro?

14 A. That is correct.

15 Q. Do you remember when that was?

16 A. April, April 18.

17 Q. Mr. DiMuro, during the course of that deposition
18 you remembered writing a memorandum with respect to
19 Universal tours on or about July 27, 1982 advising that the
20 King Kong character is not to be modeled after the ones
21 used in either of the two motion pictures, but rather is to
22 be based upon generic apes or an ape from a zoo or from
23 wildlife.

24 You remembered during your deposition giving
25 that advice in or about July of 1982, did you not?

1 A. Yes, I did.

2 Q. But, Mr. DiMuro, in your deposition you didn't
3 remember whether or not you had given that advice at any
4 time prior to your memorandum of June 18, 1980 and before
5 July of 1982, did you?

6 MR. FAIRHURST: I'm sorry. Your Honor, I don't
7 understand the question.

8 THE COURT: Let's have it again.

9 Q. Mr. DiMuro --

10 THE COURT: The court reporter can read it.

11 MR. KIRBY: I'll rephrase it, your Honor.

12 THE COURT: All right.

13 Q. Mr. DiMuro, during the deposition which you gave
14 on April 18, 1985, one month ago, you didn't remember, did
15 you, that you had given similar advice to the advice you
16 gave in July of 1982 with respect to tour attractions to
17 anyone else at Universal prior to that date? I'm making
18 the statement you didn't remember, did you?

19 A. I don't know what you are talking about.

20 Q. Well, Mr. DiMuro, do you--

21 A. Show me the deposition.

22 Q. Mr. DiMuro, do you remember being asked this
23 question and giving these answers, page 78, line 5:

24 "Q. Well, did you have occasion at any point
25 from your June 18, 1980 memo until July 27, 1982, to advise

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1 people at Universal or MCA that the King Kong character was
2 'not to be modeled as ones used in either of the two motion
3 pictures but rather to be based upon generic apes or an ape
4 from a zoo or from wildlife'?

5 "A. I don't recall any specific instances
6 where I gave this advice again.

7 "Q. I am asking prior to July of 1982?

8 "A. I don't recall."

9 A. I don't recall.

10 Q. Do you recall being asked those questions and
11 giving those answers on April 18, 1985?

12 A. Yes.

13 Q. Thank you. But you now recall, don't you, Mr.
14 DiMuro, that on April 8, 1982, you advised Mr. Sheinberg
15 himself that RKO owned the visual images and you proposed
16 guidelines or Universal apes, which included that the ape,
17 must be designed as an independent, original creation
18 without reference to stills or reproductions of RKO's apes
19 or DiLaurentiis' ape; is that correct?

20 A. Right.

21 Q. And it was after your deposition, wasn't it, Mr.
22 DiMuro, that a copy of the April 8, 1982 memorandum was
23 furnished to Nintendo; is that correct?

24 A. You will have to ask Mr. Fairhurst. I don't
25 know when it was furnished.

1 Q. Let me ask you this, Mr. DiMuro: Was it after
2 your deposition on April 18, 1982, that you discovered this
3 memorandum in the files of MCA or Universal?

4 A. I don't recall.

5 Q. Do you recall whether you had found it prior to
6 April 18, 1985?

7 A. I don't recall.

8 Q. Do you recall furnishing the memorandum at any
9 time to Mr. Fairhurst?

10 A. I must have furnished it to him in the course of
11 discovery because I was the source of the information
12 gathering, that's correct.

13 Q. But you sitting here today don't have any memory
14 at all of when you gave him this memorandum from you to Mr.
15 Sheinberg, Defendant's Exhibit 89 in evidence, dated April
16 8, 1982?

17 A. Mr. Kirby, I gave him that memo along with
18 innumerable documents. So what are you asking me?

19 Q. I am asking you sitting here today--

20 A. Whether I recall specifically if I gave him this
21 one document on a particular date, no, I don't.

22 Q. I am asking you, Mr. DiMuro, so we understand
23 this: Look at Defendant's Exhibit 89. I am asking you
24 sitting here today if you have any memory of when you
25 furnished that document to Universal's counsel in this

1 proceeding.

2 A. I have a very clear memory of writing this memo,
3 a very distinct memory of writing it.

4 If you are asking me the precise date that this
5 document, along with many other documents was given to Mr.
6 Fairhurst, no, I don't remember. But I certainly remember
7 that I wrote the memorandum and that the information was
8 accurate and it was my considered opinion.

9 Q. Mr. DiMuro, I am not asking you for the precise
10 date.

11 Let me ask you again: Did you furnish it to him
12 after your deposition was taken one month ago?

13 A. I don't recall.

14 Q. Mr. DiMuro, did you have occasion to read your
15 deposition after it was taken?

16 A. I certainly did.

17 Q. Did you make corrections on your deposition?

18 A. I made some corrections, that's correct.

19 Q. Did you correct what appears on page 78 at line
20 18 when you made those corrections?

21 MR. FAIRHURST: Objection, your Honor. When you
22 look at 78 you may see the reason why.

23 (Continued on next page)
24
25

1 (Record read)

2 A. Mr. Kirby, it is certainly and obviously implied
3 in this memorandum. All you have to do is read it.

4 Q. I read it, Mr. DiMuro. I am asking you to point
5 out to me where that concept is embodied in words in this
6 memorandum that you wrote.

7 A. All right. If I am saying in this memorandum --

8 Q. Which page are you referring to?

9 A. Let's start on page 11. If you will read on
10 page 1 the third paragraph, "It should be noted that RKO
11 owns the visual representation of the King Kong ape." That
12 is very clear, precise and concise language. That means
13 that you can't copy the exact reproduction of the King Kong
14 ape, whether it is on a copyrighted still or whether it is
15 in the movie. It is very clear, as clear as daylight.

16 Q. Mr. DiMuro, do you anywhere in this memorandum
17 advise Mr. Sheinberg, who on April 8, 1982 -- what was his
18 title?

19 A. Mr. Sheinberg?

20 Q. Yes.

21 A. He is president of MCA.

22 Q. Was he the man who retained you after you faced
23 mandatory retirement at MCA? Did he personally retain you?

24 A. That is correct.

25 Q. He is the one who hired you.

When you wrote to him on April 8, 1982 you were writing about a movie, is that correct? Is the subject of this memorandum a movie?

A. Right.

Q. Who was going to produce that movie?

A. Dino De Laurentis.

Q. And you testified, both in your direct examination and in response to questions at your deposition, that King Kong was a project near and dear to Mr. Sheinberg's heart, didn't you?

A. That is correct.

Q. Did you anywhere in this memorandum tell Mr. Sheinberg that you were giving him very conservative advice? Does that thought appear anywhere in this memorandum?

A. Mr. Kirby, you are missing the point of this memorandum and let me explain why.

Q. Please answer the question.

A. No, you are missing the point.

Q. Please answer the question.

A. This memo --

MR. KIRBY: Your Honor, could I please have a direction?

THE COURT: Yes. Of course the question will be answered, but it is not clear that it wasn't going to be answered.

1 Q. Would you like to have the question read again
2 to you, Mr. DiMuro?

3 A. Yes.

4 MR. KIRBY: Would you please read it to him.

5 (Record read)

6 A. Mr. Kirby, it is obvious from the tenor of this
7 memorandum that it is a conservative memorandum. Anyone
8 who reads this memorandum and understands it can come to
9 that conclusion. This is a conservative approach to a
10 production matter.

11 Now let me tell you how this memorandum
12 initiated.

13 Q. Well --

14 A. If you will -- you asked me a question and I am
15 going to answer it. I am going to answer the question
16 unless the court prohibits me from answering it.

17 MR. KIRBY: Your Honor, I would request that the
18 witness be confined somewhat to the questions that I give
19 him. My question asked him, was very particular and asked
20 him whether this memorandum contained anything that said to
21 Mr. Sheinberg --

22 THE COURT: Yes, I recall it. I think the
23 question has been answered.

24 Q. Turning to the guidelines that you issued here,
25 looking at paragraph 2, Mr. DiMuro, do these words appear:

1 "The Universal ape must be designed as an independent
2 original creation without reference to stills or other
3 reproductions of RKO's ape or De Laurentis's ape"? Do
4 those words appear?

5 A. Do those words appear where?

6 Q. In paragraph 2 of your guidelines, the first
7 sentence, Mr. DiMuro.

8 A. The first sentence reads: "The Universal ape
9 must be designed as an independent original creation
10 without reference to stills or other reproductions of RKO's
11 ape or De Laurentis's ape."

12 What is your question?

13 Q. I asked if those words appear there. You wrote
14 those words?

15 A. Of course. It is my memorandum.

16 MR. FAIRHURST: Your Honor, do we really have to

17 THE COURT: Now, now, it is cross-examination.

18 MR. FAIRHURST: I am aware of that.

19 THE COURT: Yes, all right.

20 Q. I believe you testified that no one else
21 participated in writing these guidelines other than
22 yourself, is that correct?

23 A. That is correct, yes.

24 Q. In the first guideline you say that nobody
25 involved in the movie should even look at the RKO 1933 or

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1 Son of Kong or De Laurentis's King Kong for any purpose.
2 Didn't you say that?

3 A. That is what it says.

4 Q. Didn't you also say that no personnel involved
5 in the production should even read or refer to any
6 publications dealing with the production of RKO or De
7 Laurentis's King Kong?

8 A. For the limited specific purpose of this
9 memorandum, and you are missing the point, Mr. Kirby,
10 because this memorandum is simply addressed to the issue --
11 hear me out, please -- does --

12 Q. I don't think I will have any choice.

13 A. -- does Universal have to deal with De
14 Laurentis if Universal decides to produce a King Kong
15 motion picture. Now please let me answer the question.

16 If you will look at the settlement agreement
17 between Universal and RKO you will find the provision which
18 I have quoted here, that Universal will not commence
19 production of Universal's King Kong motion picture unless
20 De Laurentis consents. The background of that is that De
21 Laurentis took the position after doing the 1976 remake
22 that RKO had agreed to give him the additional right to
23 make a second King Kong motion picture, and therefore the
24 premise of this memorandum, Mr. Kirby, is entirely
25 different from the premise of the other memos which I may

1 have sent advising the corporation as to what we could do
2 with respect to King Kong. This is simply addressed to
3 that one issue: Does Universal have to deal with Dino De
4 Laurentis before it makes its King Kong motion picture.
5 With that context and within those parameters I decided
6 that the conservative approach was to have these guidelines,
7 only for that specific objective.

8 Q. Mr. DiMuro, do I understand from the extensive
9 answer you just gave that the advice with respect to
10 Universal's use of an ape in connection with King Kong
11 which you rendered in this exhibit, Defendant's Exhibit 89,
12 on April 8, is different from the advice that you rendered
13 three months later in July with respect to the Tours
14 Attractions?

15 A. Entirely different subject matter.

16 Q. Is the advice different?

17 A. I would have to take the two memos and compare
18 them side by side before I could answer that question.

19 Q. I represent to you, Mr. DiMuro, that what
20 appears right here is a direct quote from what Universal
21 designed the Tours Attraction and that the evidence, as you
22 will see, since you are quoted, says that you are the
23 source of it.

24 I am asking you right now, Mr. DiMuro, since you
25 have just said that the April 8 memorandum was under unique

1 circumstances, whether you rendered different advice in
2 July of 1982 than you rendered on April 8 of 1982 to Mr.
3 Sheinberg with respect to how Universal had to create its
4 own ape.

5 A. Mr. Kirby, let me explain.

6 Q. Would you please answer that question, Mr.

7 DiMuro.

8 A. I am trying to, if you will give me a chance.
9 Just let me explain. You have asked me a question now and
10 I am going to answer it.

11 The April 8, '82 memo was written with a
12 specific purpose and a specific objective in mind. I have
13 said that once more and I repeat it. Therefore, the
14 elements of that memorandum are to be distinguished from a
15 situation where I am giving advice to the tours department,
16 where Dino De Laurentis is not involved, where we don't
17 have a contractual provision to deal with in the June 4,
18 1980 settlement agreement.

19 This memo of April 8, 1982 deals with the June 4,
20 1980 agreement and to the particular contract language that
21 we have to live with. That memorandum over there in July
22 is simply an inhouse opinion from the law department, from
23 Joe DiMuro to people in the tour center as to what they can
24 do with respect to a mock-up that is going to be in the
25 tour center and possibly in the Florida facility, two

1 entirely different situations.

2 Q. Mr. DiMuro, was the advice you rendered to Mr.
3 Sheinberg because of the unique circumstances to which you
4 have just testified in April of '82 more conservative than
5 the advice you rendered in July of '82?

6 A. The memoranda speak for themselves.

7 Q. I am asking you, Mr. DiMuro. Did you intend to
8 give more conservative advice in April than you did in July?

9 A. I intended to deal with each problem as it arose,
10 and in my best judgment on April 8, '82 when I was dealing
11 with a contract provision in the settlement agreement, this
12 memorandum was the most honest, the most precise memorandum
13 that I could give to my executive, and the best advice that
14 I could give him. That memorandum was the best and most
15 precise and careful advice I could give to the tour center
16 at that point in time when we had no contractual provision
17 to worry about. We were dealing in an entirely different
18 level, an entirely different situation.

19 Q. Mr. DiMuro, has your advice since June 18, 1980
20 with respect to Universal's use of in any way, shape or
21 form, by licensing, in a movie or any other way, of a King
22 Kong ape ever varied or has your position been consistent?

23 A. Mr. Kirby, I think my position has been very
24 consistent and I think that I have tried a conservative
25 approach to questions that were raised and were posed to me,

1 and I dealt with each problem as it arose, and on this
2 specific memorandum I have given an answer that we had a
3 particular contract provision that we had to deal with.

4 Q. Did you in any writing anywhere, beginning with
5 your June 18, 1980 memorandum, advise any executive of
6 Universal or MCA that you were taking a very conservative
7 position with respect to Universal's rights? Did you ever
8 in writing make that statement?

9 A. No. I am telling you, Mr. Kirby, that I am a
10 conservative man by nature and this is the opinion that I
11 gave and this is the opinion that I thought was a safe and
12 honest opinion to give.

13 Q. Is the answer to my question no?

14 A. Did I specifically use the word conservative?

15 Q. Yes.

16 A. I don't recall that I did, no.

17 Q. Did you ever say in words or substance that our
18 rights are actually greater than what I am now advising you
19 but the conservative approach or a safer approach is to
20 proceed along the lines of not in any way modeling it after
21 the RKO or DDL ape?

22 A. Mr. Kirby, I wrote the memorandum, the various
23 memos I wrote, as precisely as I could and as close to the
24 actual situation that I could get.

25 Q. Is that your answer to my question?

1 A. Yes.

2 Q. Mr. DiMuro, you have testified at some length on
3 direct examination about your involvement in Universal's
4 litigation against RKO, and I assume that is a term you use
5 to refer to the overall cases that were filed, the cases,
6 both the federal case, the state case, the claims and
7 counterclaims that were made by Dino De Laurentis and
8 Paramount and so forth, is that correct?

9 A. That is correct, yes.

10 Q. You were the one at Universal who was involved.

11 A. I was the one who had the responsibility of
12 pursuing the litigation and keeping management advised as
13 to what was happening.

14 Q. Mr. DiMuro, in that action you reviewed the
15 complaint in the federal court before it was filed, didn't
16 you?

17 A. Yes.

18 Q. And I believe you testified that the purpose of
19 filing that second lawsuit in the federal court was to
20 establish that the King Kong story was in the public domain
21 and freely available to all to use, is that correct?

22 A. That is correct.

23 Q. And you filed that lawsuit after making an
24 investigation which you have testified about, didn't you?

25 A. That is correct.

1 I can't tell you what motivated Gang Tyre &
2 Brown or Rosenfeld Meyer & Sussman to deny these
3 allegations. I don't know the answer.

4 Q. Mr. DiMuro, you are not denying that you
5 personally are sophisticated in trademark and copyright
6 matters, are you?

7 A. I don't pretend to be a trademark expert.

8 Q. Are you a copyright expert?

9 A. I am versed in entertainment law, Mr. Kirby.

10 Q. Does that include knowledge of copyright and
11 trademark law?

12 A. It includes basically copyrights.

13 Q. I note, Mr. DiMuro --

14 A. But I don't hold myself out as a trademark
15 expert, Mr. Kirby. Let me make that clear to you.

16 Q. More expert on copyrights than trademarks, is
17 that a fair statement?

18 A. No, that is not a fair statement.

19 Q. Why don't you give me a fair statement?

20 A. A fair statement is that I am experienced in
21 entertainment law and all the parameters of entertainment
22 law.

23 Q. And you don't include trademark law within the
24 parameters of entertainment law?

25 A. Not necessarily. Tangentially there might be

1 occasions when it becomes involved, yes, but basically we
2 are talking about copyrights, intellectual property.

3 Q. Mr. DiMuro, perhaps you can enlighten me on this:
4 At the time when Universal was seeking declaratory judgment
5 that it had the right to make the movie King Kong because
6 the story was in the public domain -- that is correct, what
7 I have said so far, isn't it?

8 A. Because of the probability that the story was in
9 the public domain. That had not been established, Mr.
10 Kirby. That was a theory of the declaratory relief action.

11 Q. I understand.

12 If, Mr. DiMuro, as alleged in paragraph 17 of
13 the DDL counterclaim, RKO held a trademark with all that
14 good will and everything else that is described in that
15 paragraph in 1975, then even if the story was in the public
16 domain Universal couldn't make a King Kong movie and call
17 it King Kong, could it?

18 MR. FAIRHURST: Objection.

19 THE COURT: Overruled.

20 A. It would depend upon the extent of the secondary
21 meaning. I would answer.

22 (Continued on next page)

1 you to answer the questions as I put them to you, but you
2 have just testified that you have a different opinion than
3 what Mr. Kroft argued to Judge Real in 1976; is that
4 correct? Is that what I have just heard you say?

5 A. Yes.

6 Q. Yes or no?

7 MR. FAIRHURST: He can't answer the question yes
8 or no, because it hasn't got the time element properly put
9 into it. It's a meaningless question. It's something that
10 would come from Lewis Carroll the way he has just put it.

11 Q. Today, do you have an opinion?

12 MR. FAIRHURST: Thank you, Mr. Kirby, now you
13 put it in.

14 Q. Sitting on this witness stand, do you have a
15 different opinion, Mr. DiMuro, than the statements that Mr.
16 Kroft expressed and made to Judge Real in another federal
17 court; yes or no, do you have a different opinion?

18 A. I do.

19 Q. Okay. Now, will you tell me during what year
20 you formulated that different opinion?

21 A. I don't recall the specific year.

22 Q. Was it this year?

23 A. I don't recall.

24 Q. Was it in 1980?

25 A. I don't recall.

1 Q. Do you recall any specific event which might
2 help you recall the time that triggered your rethinking
3 this subject, Mr. DiMuro?

4 A. Yes.

5 Q. What was that event?

6 A. I became aware of the tremendous success of the
7 ET merchandising campaign. I became aware --

8 Q. What year was that?

9 A. I don't recall the year.

10 Q. Was it in the 1980's?

11 A. I beg your pardon.

12 Q. Was it in the 1980's when you became aware of
13 the tremendous success of the ET merchandising campaign?

14 A. That is it came back to me that we had a very
15 successful ET merchandising campaign.

16 Q. That was in the 1980's?

17 A. Right.

18 Q. What year was ET produced?

19 A. It's been produced within the last five years.

20 Q. You can't pinpoint it any more definitely for me
21 than 1980 to 1985?

22 A. I can only tell you that at some point I was
23 aware of the success of the ET merchandising campaign.

24 Q. Is that the event that led you to formulate an
25 opinion contrary to the opinion that Mr. Kroft expressed in

1 1976 to Judge Real; is that the event?

2 A. Well, yes.

3 Q. Is there any other event?

4 A. The success that Universal had merchandising

5 Jaws.

6 Q. When was Jaws produced?

7 A. Prior to ET.

8 Q. Do you know was that in 1981?

9 A. I am not going to speculate. I don't remember
10 exactly.

11 Q. Do you remember if it was after 1975?

12 A. Yes, it was after 1975.

13 Q. Was it before June of 1980?

14 A. I don't recall the precise date. The Jaws --
15 Jaws preceded ET.

16 Q. Looking at the ET merchandising campaign, Mr.
17 DiMuro, how did you learn about the ET merchandising
18 campaign?

19 A. This was a very successful campaign at Universal.

20 Q. Did you read about it in the newspaper?

21 A. I went into the drugstore and you would see an
22 ET item. It's generally known. But it struck me --

23 Q. I am asking you now, Mr. DiMuro, a specific
24 question, how you became aware of the ET merchandising
25 campaign and I understand you to say that you can walk into

1 a drugstore. Is there any other way you became aware of
2 the ET merchandising campaign?

3 A. I was aware that it was a successful campaign
4 because we were doing a lot of merchandising. The company
5 was entering into a lot of merchandising arrangements and I
6 know that it was a very successful campaign.

7 Q. Do you know what the revenues Universal obtained
8 in the ET merchandising campaign with were?

9 A. I don't know; I can get them. They were very
10 substantial.

11 Q. Did you ever know what they were?

12 A. They ran into the millions I'm sure.

13 Q. That's your speculation?

14 A. You asked me for an estimate. I don't know
15 without checking our accounting department.

16 Q. Thanks, Mr. DiMuro.

17 Did you work with the merchandising people in
18 the ET merchandising campaign?

19 A. I did not.

20 Q. How did you become aware of what the
21 merchandising people were doing with respect to ET?

22 A. Mr. Kirby, ET was such a fantastically successful
23 picture and the merchandising was so successful that this
24 is a matter of common knowledge, Mr. Kirby, common
25 knowledge. Anyone in the industry knows this.